



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 20, 1996

Mr. Santiago O. Alanis, Superintendent
Raymondville Independent School District
One Bearkat Boulevard
Raymondville, Texas 7850-3351

OR96-0366

Dear Mr. Alanis:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36928.

The Raymondville Independent School District ("RISD") originally received a request for certain evaluations from personnel files and other documents pertaining to an alleged incidents involving an employee of the school. The documents were returned as some or all of the records appeared to be excepted from disclosure under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. §1232g. You have re-submitted some of the returned documents for our review as "Item A" and "Item B" reasserting originally-claimed exceptions under sections 552.101, 552.102, 552.103 and 552.114, of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The pertinent statute invoked under this exception, Section 21.355 of the Education Code provides:

A document evaluating the performance of a teacher or administrator is confidential.

The Open Records Act does not authorize the withholding of information to the public, except as expressly provided. Open Records Decision No. 276 (1981). Neither the Open Records Act or the Education Code provide for the withholding of the evaluation of a teacher's aide or a school nurse evaluation. The exceptions you assert under section 552.102 and 21.355 of the Texas Education Code for a teacher's aide or a school nurse do not exist under the plain meaning of the law before us.

A portion of "Item B" may be excepted from disclosure under FERPA, section 552.101 and section 552.114 of the Government Code as "education records." FERPA applies to those records which:

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the appropriate portion under "Item B" to be withheld.

Section 552.101 protects information when disclosure of the information would constitute the common-law tort of invasion of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 628 (1994) at 4, 579 (1990) at 2, 562 at 9 (1990). Information may be withheld under section 552.101 in conjunction with the common-law right of privacy if: (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) the information is of no legitimate concern to the public. *See* Open Records Decision No. 628 (1994). We have marked the portions of the handwritten statement that you submitted as "Item B" that meet the criterion. The documents in "Item A" generally relate to actions of public employees and matters of public business and as such are of legitimate public interest. *See, e.g.*, Open Records Decision No. 444 (1986) at 4 (legitimate public interest in information relating to public employees). Additionally, the remaining information is not of a highly intimate or embarrassing nature about a person's private affairs. Accordingly, documents in "Item A" as well as the unmarked portions of the statement in "Item B" may not be withheld under 552.101.

Section 552.102 is designed to protect public employees' personal privacy and establishes as an exception "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy...". The scope of section 552.102 protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102 protection is the same as that for information protected by common-law privacy under section 552.101 as stated in the preceding paragraph. The information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex.App.--Austin 1983, writ ref'd n.r.e.). We conclude that, subject to the markings already made under 552.101, the 552.102(a) exception does not apply to the statement submitted as "Item B" because it does not reveal highly intimate or embarrassing information. Additionally, under "Item A" none of the personnel forms submitted for review contain information within the 552.102(a) exception.

You also raise Section 552.103(a), the "litigation exception," to both "Item A" and "Item B." RISD has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. RISD must meet both prongs of this test for information to be excepted under section 552.103(a). RISD has not met either prong of the test. The single fact that a request for information is made by an attorney on behalf of a individual is not sufficient to invoke section 552.103. See Open Records No. 361 (1983). We decline to apply this exception to any of the relevant documents and conclude that you must release the documents under "Item A" and "Item B" subject to the portions we have marked.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/ch

Ref.: ID# 36928

Enclosures: Submitted documents

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(w/o enclosures)